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STATUS OF SUICIDE AS A CRIME.

The questions of the most practical importance relative to this subject are: (1) Is the attempt to commit suicide a crime? (2) Is one guilty of a crime who, in the attempt at suicide, without culpable negligence, unintentionally kills another? (3) Is it a crime to aid, advise, abet or encourage another to commit suicide?

At common law the answer to these questions was easy and was in the affirmative in each instance, but this was due to the fact that suicide itself was then a *felony* punishable by an ignominious burial and *forfeiture of goods*. The crime *then* presented no questions which were not common to other felonies and solvable under general principles of the criminal law.

Under the present state of the law in this country, however, the above questions are by no means free from difficulty. This is due to the fact that in all the States, so far as is known, *forfeiture of goods* has been abolished (see Va. Code, § 3883) and suicide is dispunishable. When we remember that an act to be criminal must be *punishable by the State* (Clark's Criminal Law, p. 1) we at once see that suicide is no longer a crime. If it be no longer a *crime* how can the attempt to commit it, the unintentional killing of another in such attempt, or the encouraging or advising its commission be criminal?

In considering these questions it is necessary to bear in mind that in the criminal law an *attempt* necessarily presupposes the criminality of the consummated act; that an unintentional killing to be *murder* must have occurred in the attempt to commit a *felony*, and to be *manslaughter* must have taken place in the commission of an *unlawful act* not amounting to a felony nor likely to endanger life, or by *culpable negligence* (Clark's Criminal Law, pp. 191, 204); and that in order for a person to be liable as accessory before the fact or principal in the second degree to a felony there must have been a principal *criminal* (Clark's Criminal

Law, pp. 107, 113). Once admit, as we must, that a consummated suicide is not a crime, and where can we find a principle of the common law to punish the acts above mentioned? It is believed that, in strict law, they are not punishable without statutory aid. The courts, however, in the few cases where the questions have arisen, have either ignored the principles above mentioned, assigned untenable grounds for their decisions, or stretched to the tearing point the doctrine of accessorial guilt.

Let us see how the American decisions stand on each of these questions.

(1) *Is the Attempt to Commit Suicide a Crime?*

Some of the States have enacted statutes making the attempt at suicide a felony. Such statutes exist in New York, North Dakota and South Dakota. See May *v.* Pennell, infra. In such cases, of course no difficulty exists. The question is as to the law in the absence of such statutes.

In State *v.* Carney (N. J. L.), 55 Atl. 44, Carney tried to kill himself by poison, and, being unsuccessful, was indicted and convicted for his attempt at suicide. His conviction was sustained by the appellate court under the authority of a New Jersey statute which provides that "All other offenses of an indictable nature at common law, and not provided for in or by this or some other act of the legislature, shall be misdemeanors, and be punished accordingly." It was said that the New Jersey law differed from that of Massachusetts, which controlled the decision in Com. *v.* Dennis, 105 Mass. 162, in that in Massachusetts all attempts were provided for by statute, none being provided for where the consummated act was dispunishable, and this was a repeal by implication of the common law. No such statutory provision as to attempts existed in New Jersey.

In Com. *v.* Dennis, 105 Mass. 162, Dennis was indicted for an attempt to commit suicide. Held, that a demurrer to the indictment should have been sustained; that all attempts were regulated by statute in Massachusetts, and that only attempts to commit acts which if completed would constitute crimes and be punishable were provided for; that suicide is not punishable, and, therefore, the attempt to commit it cannot be punished. The court says:

"The end of punishment is the prevention of crime, and it may have been thought at least impolitic to punish an attempt to do that which is itself dispunishable, when the direct effect of the penalty must be to increase the secrecy and efficiency of the means employed to accomplish the end proposed."

In May *v.* Pennell, 101 Me. 516, 64 Atl. 885, 7 L. R. A. (N. S.) 286, the supreme judicial court of Maine held that an attempt to commit suicide is not a crime in the absence of a statute making it such, or making suicide a crime. The decision was placed upon two grounds: First, that when the completed act is not criminal there can be no crime in the attempt to commit it. Second, that the whole subject of attempts is regulated in Maine by statute, and that their statutes only make attempts crimes where the act attempted is punishable.

The answer to the question would thus seem to depend on whether the State had adopted the general common law as to crimes and had not by statute fully regulated the subject of attempts. In the latter case the common law as to the attempt would be repealed by implication. Even when the subject of attempts is not regulated by statute the further inquiry presents itself: The complete act of suicide being in all of the States dispunishable and, therefore, noncriminal, and the common law being to this extent repealed, does not that carry with it an implied repeal of the crime of attempt to commit such act? The question is thought to be at least doubtful. It was, as above seen, one of the grounds of the decision in May *v.* Pennell, supra.

Under the Virginia statutes it is not believed that the attempt to commit suicide is a crime. It is thought that the same considerations which controlled the decision of the Massachusetts court in Com. *v.* Dennis, supra, would apply and require a like decision in this State. Code of Virginia, § 3883, abolishes forfeiture of estate as a penalty for suicide, and there is no penalty for the crime provided by the Virginia statutes. Suicide is, therefore, neither a felony nor a misdemeanor in this State. It is true that Virginia Code, § 2, adopts the common law as far as not repugnant to our institutions, and that § 3902 provides that "A misdemeanor, for which no punishment is prescribed by statute, shall be punished by fine or confinement in jail, or both, in the discretion of the jury, or of the court trying the case without a jury." But from this it

cannot be successfully argued that even though suicide is no longer a crime because it is not punishable, yet that the *attempt* to commit it was a common-law misdemeanor, and common-law misdemeanors not otherwise provided for are retained by § 3902. The answer to such an argument is not only that the abolition of the crime by the repeal of its punishment might be taken as an implied repeal of the crime of an attempt in such case, but also that the subject of attempts is fully regulated by § 3888 of the Virginia Code, and that under such section attempts are denounced only "If the offense attempted be *punishable.*" Statutory regulation of a subject is an implied repeal of the common law. Virginia Code, § 3881, provides that "A common-law offense, for which punishment is prescribed by statute, shall be punishable only in the mode so prescribed." The punishment for the common-law offense of *attempt* is fully prescribed by statute (§ 3888), and there is no "mode" of punishment provided for any attempt save only where "the offense attempted be *punishable.*"

(2) *Is One Guilty of a Crime Who in the Attempt at Suicide, without Culpable Negligence, Unintentionally Kills Another?*

The answer to this question, as we have seen, depends on whether an attempt at suicide is an *unlawful act,* i. e., a *crime.* This proposition we have just discussed. The question has arisen in several cases.

In State *v.* Levelle (S. C.), 13 S. E. 319, 27 Am. St. Rep. 799, a man trying to kill himself accidentally killed his wife. A verdict of *murder* was sustained. The court said that in South Carolina there was no general statute defining felonies; that suicide was a felony at common law; and that the South Carolina legislature in using the word "feloniously" in the prescribed form of coroner's verdict in such case "expressly recognized it as retaining its common-law character as a felony." It does not appear in the opinion, however, that any punishment is provided for a suicide in South Carolina.

In Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109, the facts were as follows: Charles Ricker broke his engagement of marriage with Lucy Ann Mink. She attempted suicide, and he, in trying to prevent her from shooting herself, was accidentally shot and killed. She was indicted for murder and was convicted of *man-*

slaughter. This conviction the appellate court refused to disturb. The court did not impugn the authority of Com. *v.* Dennis, 105 Mass. 162, which held that to attempt suicide is not a crime, but simply held that, though this was so, and though it was certainly not a *felony* to commit suicide in Massachusetts, yet "being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal."

It is submitted that it is a contradiction in terms for the Massachusetts court to say in one case that an attempt at suicide is not a crime, and in another, while not professing to question the former decision, to say such act is "unlawful and criminal as *malum in se*." Certainly the mere fact of an act being *malum in se* does not make it criminal.

(3) *Is It a Crime to Aid, Advise, Abet or Encourage Another to Commit Suicide?*

As we have seen, the puzzling question here is, how can there be an accessory or a second degree principal when there is no principal in the first degree, the suicide itself not being a crime? If the answer to this question depended on the law of accessorial guilt the objection above suggested would appear insuperable. At least one of the courts, however, has attempted to obviate this objection by a process of reasoning which, though it would seem to go very far, is at least plausible.

In Burnett *v.* People (Ill.), 68 N. E. 505, 66 L. R. A. 304, 98 Am. St. Rep. 206—a case of a suicide pact—the question is fully discussed on principle and the court holds that one who aids or abets a suicide is neither an accessory before the fact nor a principal in the second degree, but is himself principal in the first degree. The court says that its holding is that "The act of the principal, when done pursuant to the will and direction of the accessory, is the act of the accessory," and that when this is kept in mind "it becomes immaterial what was the character of the crime committed by the principal or whether there was any crime." In other words, the act causing death is treated as the *abetter's act*. This case also states the reasonable proposition that the mere wish that another will kill himself, accompanied by knowledge that he intends to do so, and assent to the act, does not constitute murder, unless something is done to encourage, aid, or induce the act.

In quite a full note to this case in 66 L. R. A. 304 the doctrine of this case is approved as the solution of the difficulty.

In Com. *v.* Bowen, 13 Mass. 356, 7 Am. Dec. 154, it is held that if one commit suicide upon the advice of another, the adviser is guilty of murder *as principal.*

So, in Com. *v.* Dennis, 105 Mass. 162, the court said, *passim*: "It can make no difference in principle whether the hand of the victim or the hand of another agent is employed, if the act be done in the presence of the person charged and at his instigation."

The same solution is suggested in Blackburn *v.* State, 23 Ohio St. 146.

In Com. *v.* Hicks (Ky.), 82 S. W. 265, 4 Anno. Cases 1154, it is held that one who counsels and abets a suicide, though not present at its commission, may be indicted and punished for murder as *accessory before the fact.* The court proceeded simply upon the fact that suicide was a felony at common law, and did not advert to the fact that it is no longer punishable, nor solve the question as to how there may be an accessory without a principal *criminal.* See to same effect State *v.* Jones (S. C.), 67 S. E. 160. In McMahon *v.* State (Ala.), 53 So. 89, it is held murder to aid or abet a suicide simply because at common law a suicide was *"felode se."*

Contrary to the above rulings, in Grace *v.* State (Tex.), 69 S. W. 529, the court held that, whatever the common law may have been, "It is not a violation of any law in Texas for a person to take his own life. * * * So far as the law is concerned the suicide is innocent; therefore the party who furnishes the means to the suicide must also be innocent of violating the law. We have no statute denouncing suicidal acts; nor does our law denounce a punishment against those who furnish the suicide with the means by which the suicide takes his own life." The court noticed none of the cases in the other States, and, it may be added, the facts were held to clearly fall short of showing a guilty participation by the accused in the act of suicide, and what was said was to some extent a *dictum.*

In Sanders *v.* State (Tex. Cr. App.), 112 S. W. 68, the Texas court adhered to its ruling in Grace *v.* State, supra, and, on full consideration, held that in Texas since it is not a violation of law

for a person to commit suicide, one who furnishes another the means to the commission of suicide violates no law.

Even under the solution suggested in Burnett *v.* People, *supra,* the question where the guilty participant was technically an *accessory before the fact* would be attended with some difficulty in Virginia. The reason is that in Virginia an accessory before the fact must be indicted *as accessory* (Hatchett's Case, 75 Va. 931; Thornton's Case, 24 Gratt. 669), and would not this make the indictment demurrable, or, at any rate, preclude a conviction *as principal?*

The text-writers on the subject do not go into it at any length, nor furnish any solution for the difficulties suggested. See Clark's Crim. Law, pp. 191, 195, 205; Clark & Marshall on Crimes, pp. 344-345, 372; 2 Bishop's Crim. Law, pp. 682-684; 21 Am. & Eng. Encl. Law, pp. 105, 147; Note in 66 L. R. A. 304; Note in 4 Anno. Cases 1154.

There is a statute in Missouri providing that "Every person deliberately assisting another in the commission of self-murder shall be deemed guilty of manslaughter in the first degree." State *v.* Webb, 216 Mo. 378, 115 S. W. 998, 20 L. R. A. (N. S.) 1142.

By reason of the confusion which exists, the situation would seem to be one which peculiarly calls for statutory regulation.

R. W. WITHERS.

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